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UNITED STATES PATENT AND TRADEMARK OFFICE

Trademark Trial and Appeal Board

In re Kiss My Face

Serial No. 78145333

Michael A. Cornman of Schweitzer Cornman Gross & Bondell
LLP for Kiss My Face.

John Dwyer, Trademark Examining Attorney, Law Office 116
(Meryl Hershkowitz, Managing Attorney).

Before Seeherman, Chapman and Bottorff, Administrative
Trademark Judges.

Opinion by Seeherman, Administrative Trademark Judge:

Kiss My Face, a New York corporation, has appealed
from the final refusal of the Trademark Examining Attorney
to register CLOSE ENCOUNTER as a trademark for "skin
moisturizing shaving cream, after shave lotion, body and
facial lotions, personal deodorants, facial scrubs, facial
cleansers, facial cream, liquid soaps for hand and face and
body, hair shampoos and hair conditioners, shower gels,

bath foam, and skin soap.”¹ Registration has been refused pursuant to Section 2(d) of the Trademark Act, 15 U.S.C. §1052(d), on the ground that applicant’s mark so resembles the mark ENCOUNTER, previously registered by Victoria’s Secret Stores, Inc., for “face, hand, and body lotion; bath and shower gel; talcum powder; face, body, and hand soap”² and for “perfume and cologne,”³ that, if used on applicant’s identified goods, it is likely to cause confusion or mistake or to deceive.

The appeal has been fully briefed. Applicant did not request an oral hearing.

We affirm the refusal of registration.

Our determination of the issue of likelihood of confusion is based on an analysis of all of the probative facts in evidence that are relevant to the factors set forth in *In re E. I. du Pont de Nemours & Co.*, 476 F.2d 1357, 177 USPQ 563 (CCPA 1973). See also, *In re Majestic Distilling Company, Inc.*, 315 F.3d 1311, 65 USPQ2d 1201 (Fed. Cir. 2003). In any likelihood of confusion analysis, two key considerations are the similarities between the

¹ Application Serial No. 78145333, filed July 18, 2002, and asserting a bona fide intention to use the mark in commerce.

² Registration No. 1892526, issued May 2, 1995; Section 8 affidavit accepted; Section 15 affidavit received.

³ Registration No. 1697308, issued June 30, 1992; Section 8 affidavit accepted; Section 15 affidavit received; renewed.

marks and the similarities between the goods and/or services. See *Federated Foods, Inc. v. Fort Howard Paper Co.*, 544 F.2d 1098, 192 USPQ 24 (CCPA 1976). See also, *In re Dixie Restaurants Inc.*, 105 F.3d 1405, 41 USPQ2d 1531 (Fed. Cir. 1997).

Turning first to the goods, applicant has conceded that they are related. Reply brief, p. 4. In fact, the goods are in part identical. Both applicant's application and cited Registration No. 1892526 include face and body lotion, shower gels, and body and hand soap. Therefore, they are presumed to travel in the same channels of trade and be sold to the same classes of purchasers.

The evidence of record also shows that the remaining goods in the application and the registrations are closely related. The Examining Attorney has submitted numerous third-party registrations which show that entities have registered a single mark for the goods in applicant's application and the goods in the cited registrations. See, for example, Reg. No. 2639711 for, inter alia, hair shampoo, hair conditioner, hair gel, deodorant, cologne and perfume; Reg. No. 2716551 for cologne, eau de toilette, body lotion and shower gel; Reg. No. 2711388 for, inter alia, bath and shower gel, hair shampoos, skin soap, and bath foam, perfume, eau do toilette, body and face cream,

hand cream, skim cleansing cream for body and face; Reg. No. 2709436 for, inter alia, cologne, perfume, after-shave moisturizers, soaps and after-shave lotion. Third-party registrations which individually cover a number of different items and which are based on use in commerce serve to suggest that the listed goods and/or services are of a type which may emanate from a single source. See *In re Albert Trostel & Sons Co.*, 29 USPQ2d 1783 (TTAB 1993).

In addition, the Examining Attorney has made of record excerpts of articles taken from the NEXIS database which refer to companies selling goods of the type listed in applicant's application and the cited registrations. See, for example, the following:

Why shouldn't Dad smell good, too?
Originating from Southern France, the
Provence Pour Les Hommes collection
from Baudelaire is just what he needs.
Available in two scents--Verlaine and
Green Tea--the collection includes
after-shave (\$15 for 3.4 ounces), eau
de cologne (\$15, 1.7 ounces),
shampoo/body wash (\$12.50) and facial
scrub (\$12.50).

"Asbury Park Press," June 4, 2003

...Langer fragrances, which include
Wicked Wahine. Here's a list of the
products they carry: Wicked Wahine
cologne mist (\$9.89); perfume mist
(\$9.89); body soap bar with oatmeal,
coconut oil and kukui nut oil (\$6.89);
body wash (\$7.89); and hand and body
lotion (\$7.89).

"Sacramento Bee," June 4, 2003

...cologne by Hugo Boss named after the label's chief designer.... There's eau de cologne spray (\$53), a refill (\$42), after-shave lotion (\$40), shower gel (\$21), alcohol-free deodorant stick (\$16)....

"Pittsburgh Post-Gazette," May 18, 2003

Cosmetic company Elizabeth Arden has a variety of green tea products, including perfume, lotion, shampoo, conditioner, bath salts and even deodorant.

"The Augusta Chronicle," May 13, 2003

In addition to the new perfume scent, the Cashmere Mist line includes shampoo, conditioner, hand cream and body powder.

"Poughkeepsie Journal," February 25, 2003

Although these stories are not evidence that the companies listed actually sell the indicated goods or sell them under a single mark, they do show that the public has been exposed to such information, such that they would be likely to assume that such goods emanate from the same source if they were sold under the same or a confusingly similar mark.

We turn, then, to a consideration of the marks, keeping in mind that "when marks would appear on virtually identical goods or services, the degree of similarity necessary to support a conclusion of likely confusion declines." Century 21 Real Estate Corp. v. Century Life of

America, 970 F.2d 874, 23 USPQ2d 1698, 1700 (Fed. Cir. 1992). Moreover, the question is not whether marks can be distinguished upon a side-by-side comparison, because under actual marketing conditions, consumers do not necessarily have the luxury of making side-by-side comparisons between marks, and must rely upon their imperfect recollections. *Dassler KG v. Roller Derby Skate Corporation*, 206 USPQ 255 (TTAB 1980).

In this case, applicant's mark simply adds the word CLOSE to the cited mark, ENCOUNTER. Because the second word of applicant's mark is identical to the registered mark, there are obvious similarities in appearance and pronunciation. Applicant argues that the marks have different connotations because ENCOUNTER, when used in connection with personal care items, suggests "two people meeting or a chance encounter," while CLOSE ENCOUNTER suggests "an intimate get-together." Brief, p. 6. We do not agree. Although "CLOSE" in applicant's mark provides additional information as to the nature of the "ENCOUNTER," the meaning of "ENCOUNTER" remains the same, that of a meeting.

Applicant also asserts that CLOSE ENCOUNTER has an additional meaning that ENCOUNTER does not have, since it brings to mind the motion picture "Close Encounters of the

Third Kind." At the same time, applicant acknowledges that its mark "admittedly has nothing to do with science fiction or the like." Brief, p. 7. It is not clear to us that CLOSE ENCOUNTER, when used for personal care products, would bring to mind a motion picture involving contact with extraterrestrials, especially since the term has the more logical meaning, when used with such goods, of people meeting or getting together. However, even if applicant's mark can be said to have a double entendre, obviously one of the connotations of the mark is very similar to the connotation of applicant's mark. Thus, the connotations of the marks, at least in one respect, are similar.

Further, the Examining Attorney has shown that ENCOUNTER is a strong mark, in that there are no other registrations for any ENCOUNTER marks for personal care items in Class 3 (the class in which both applicant's and the registrant's goods are classified). In view thereof, we cannot say that the cited registrations should be accorded a limited scope of protection.

Applicant has also argued that "retailers and/or distributors of fragrances, skin care preparations and associated goods, commonly use a well-known mark or house mark in conjunction with the specific trademark of the product, allowing consumers to easily identify the source

thereof." Brief, p. 9. We are not persuaded by this argument. The mark in the cited registration is ENCOUNTER; the mark for which applicant has applied is CLOSE ENCOUNTER. No house mark is included in either mark, and our determination of likelihood of confusion must be based on a comparison of the marks as they appear in the cited registrations and the application.

Applicant also asserts that the primary target group for its goods and those of the registrant are female purchasers, and that such purchasers "are known for their sophistication with respect to fragrances, cleansers, etc." Brief, p. 9. First, there is nothing in the respective identifications of goods which would limit their purchase to women. On the contrary, applicant's skin moisturizing shaving cream and after shave lotion would seem to be products with a particular appeal to men. Further, hair shampoos and hair conditioners, shower gels, personal deodorants and skin soap, listed in applicant's application, and such products as bath and shower gel, talcum powder, face, body and hand soap, and cologne, which are listed in the cited registrations, appear to us to be

products which are bought and used by both genders.⁴

Further, because many of these products are relatively inexpensive, e.g., skin soap, shampoo, skin moisturizing shaving cream, liquid soaps for hands, they are not likely to be purchased with great care or deliberation.

Considering all of the duPont factors on which there is evidence, and in particular, the identity or closely related nature of the goods, the overall similarity of the marks, and the lack of deliberation with which purchases are made, we find that the factors favoring a finding of likelihood of confusion far outweigh any additional (as opposed to different) connotation that applicant's mark may have.

Decision: The refusal of registration is affirmed.

⁴ Note the excerpt from the "Asbury Park Press" article, quoted above, which specifically discusses a toiletries line for men which includes eau de cologne, shampoo, after-shave and facial scrub.